

California Consumer Privacy Act Litigation 2021 YEAR IN REVIEW





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INTRODUCTION

California has the most comprehensive privacy law in the United States. The California Consumer Privacy Act (CCPA) went into effect on January 1, 2020, and regulates any “business” that does business in California. The CCPA provides consumers in California with greater control over data that companies collect about them. Moreover, section 1798.150(a)(1) of the CCPA provides a private right of action to “[a]ny consumer whose nonencrypted and nonredacted personal information...is subject to an unauthorized access and exfiltration, theft, or disclosure” as a result of a business failing to satisfy “the duty to implement and maintain reasonable security procedures and practices.” Damages available for a private right of action under section 1798.150(a)(1) include a statutory amount between \$100 and \$750 “per consumer per incident or actual damages, whichever is greater,” as well as injunctive or declaratory relief and “any other relief the court deems proper.”

Since the CCPA went into effect, Perkins Coie LLP has tracked every CCPA-related filing and closely monitored the litigation environment for emerging trends and important developments in the caselaw. We use real-time tracking to help advise clients on risk and develop effective defense strategies for companies facing litigation.

To date, nearly 200 lawsuits have been filed that assert claims for violation of the CCPA, or that rely on a CCPA violation to support another claim. These cases span essentially every industry, including biotech, finance, healthcare, and technology. The year 2021 saw a significant (40%) increase in the number of filings compared to 2020. In addition, appreciably more filings in 2021 involved data breaches compared to filings in the previous year, where cases alleged a host of claims beyond data breaches. This is a trend we anticipate will continue into 2022 as courts narrow claims to those that fit within the requirements for a private claim. As in 2020, the majority of CCPA cases were filed in the federal courts in California. However, there were filings in other jurisdictions, including a substantial number of cases alleging direct CCPA violation claims filed in Washington state.

In 2021, there were a number of notable court rulings and court-approved class settlements. Courts have enforced the CCPA’s limited private right of action and issued rulings relating to Article III and other pleading requirements. Also, there have been at least 17 class settlements that have received or are awaiting final court approval.

Beyond the overview offered in this report, we also monitor filings on a daily basis and provide real-time updates on cases and important industry decisions to clients and key contacts via our CCPA Litigation Digest. To receive this weekly email report, please subscribe [here](#). You can also access our CCPA Litigation Tracker [here](#), which is updated regularly and will provide you with additional information regarding statistical and legal trends in CCPA litigation.

Trends In CCPA Litigation



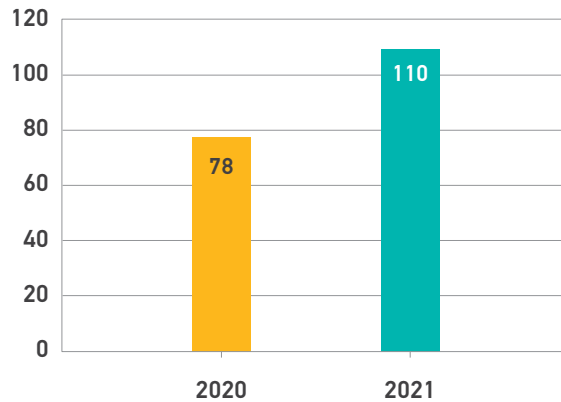
TRENDS IN CCPA LITIGATION

TOTAL FILINGS

The total number of filings in 2021 increased significantly from the previous year. There were 78 total filings in 2020, and that number jumped to 110 total filings in 2021—a 40% increase from year one to year two since the CCPA went into effect. Although we are still in the early days since the CCPA's effective date, we are noticing a clear upward trend in the number of CCPA claim filings to date and anticipate this will continue.

TOTAL FILINGS

FIGURE 1

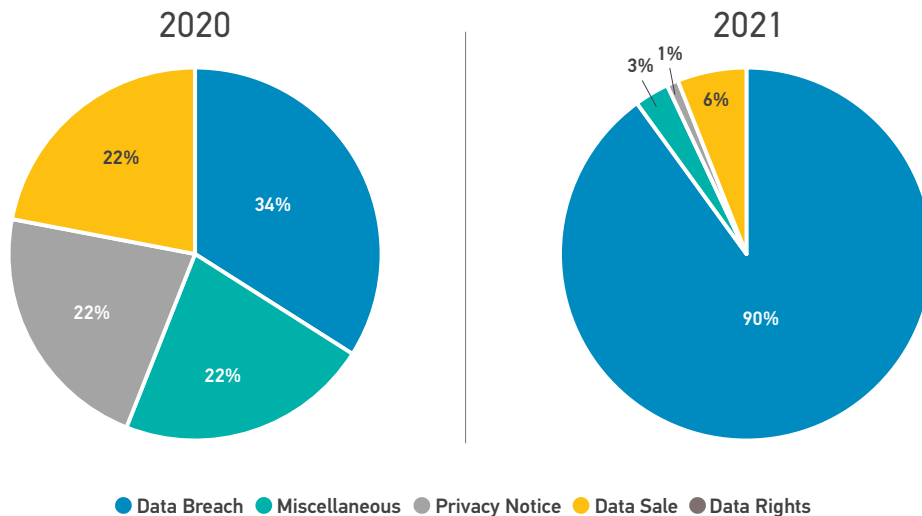


TRIGGERING CONDUCT

The CCPA does not provide consumers with a private right of action beyond a data breach claim, and thus claims for violations of CCPA privacy rights (e.g., right to notice, right to opt out, right to delete) are not allowed. Notwithstanding this, in 2020, most cases alleging a CCPA claim targeted not data breaches, but other conduct covered by the CCPA, such as privacy notice, data sale, and data rights. In contrast, in 2021, the vast majority (90%) of the CCPA cases did, in fact, focus on alleged data breaches. This significant shift is a result of multiple factors, key among them being the courts' enforcement, through motions to dismiss and other procedural vehicles, of the limitations on the CCPA's private right of action.

TRIGGERING CONDUCT

FIGURE 2

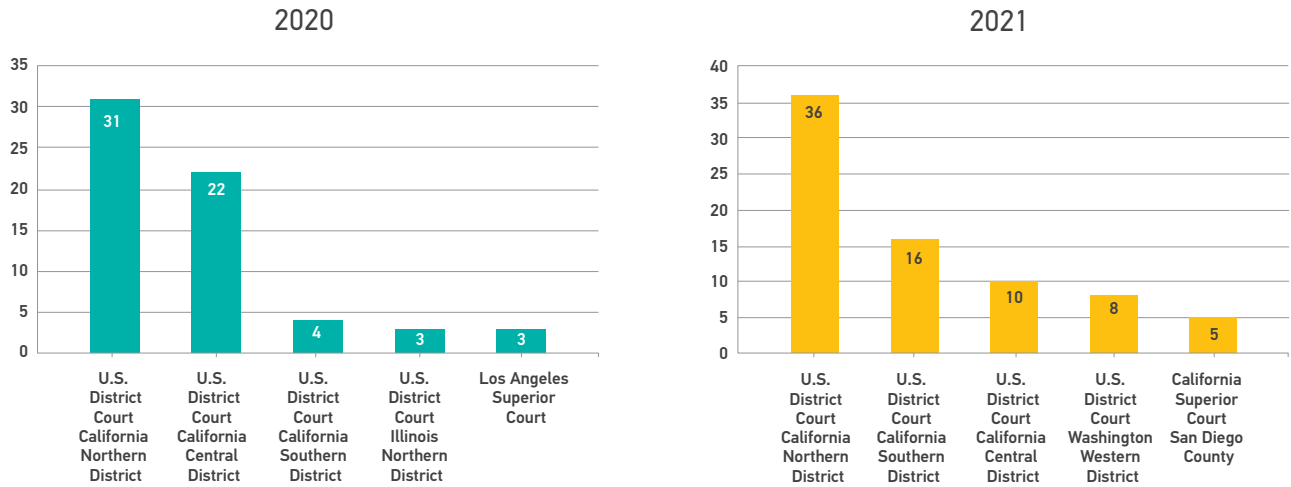


FILINGS BY JURISDICTION (TOP FIVE)

Not surprisingly, the majority of the cases asserting CCPA claims have been filed in California's federal courts. The U.S. District Court for the Northern District of California had the largest number of filings in both 2020 and 2021. While the U.S. District Court for the Central District of California had the second most filings in 2020, the U.S. District Court for the Southern District of California had the second most filings in 2021. Also, the U.S. District Court for the Western District of Washington had a substantial number of filings in 2021.

FILINGS BY JURISDICTION (TOP FIVE)

FIGURE 3

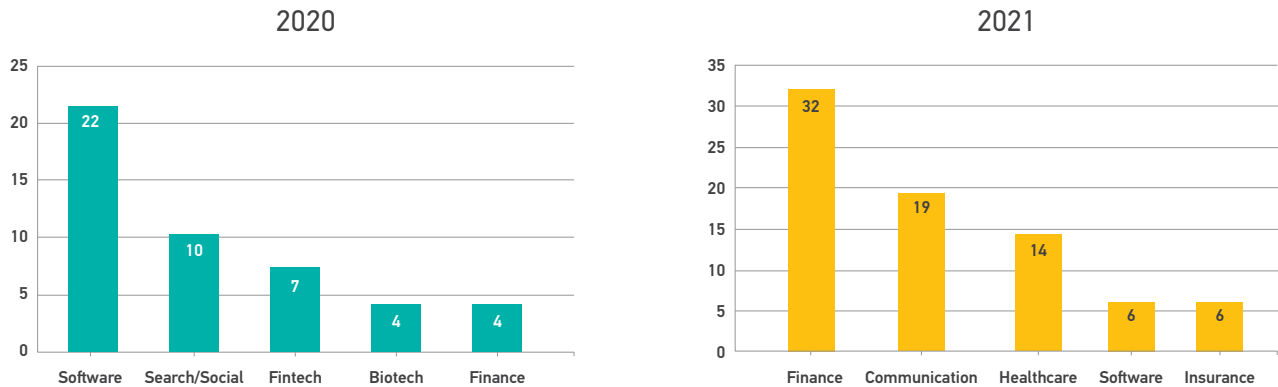


FILINGS BY INDUSTRY (TOP FIVE)

CCPA litigation spans every industry, including biotech, finance, healthcare, and technology. In 2020, most of the CCPA cases focused on the technology sector, with an emphasis on software. In 2021, finance and fintech companies had the most CCPA cases filed against them, while the communications and healthcare sectors also saw a significant number of filings.

FILINGS BY INDUSTRY (TOP FIVE)

FIGURE 4



Notable Rulings



NOTABLE RULINGS

LIMITED PRIVATE RIGHT OF ACTION

At the beginning of the year, in *McCoy v. Alphabet*, No. 20-cv-05427 (N.D. Cal. Feb. 2, 2021), Magistrate Judge Susan van Keulen in the Northern District of California dismissed a CCPA cause of action because there were no allegations of a data security breach. The allegations were that Google had collected personal information without complying with the CCPA's notice and consent requirements. The court reasoned that "[n]othing in [section 1798.150] shall be interpreted to serve as the basis for a private right of action under any other law." Accordingly, the court held that the CCPA's private right of action does not extend to non-data breach violations (e.g., CCPA notice violations).

The same court, in *Silver v. Stripe*, No. 20-cv-08196 (N.D. Cal. July 28, 2021), similarly dismissed a CCPA claim based on allegations of improper data sale and disclosure, reaffirming that the CCPA's private right of action is limited to alleged data security breaches. The court also held that, in the absence of an alleged data breach, consumers may not use the CCPA as a predicate for other claims, such as California's Unfair Competition Law (UCL). Thus, the court similarly dismissed the predicate UCL claim based on violations of the CCPA dealing solely with data sale and disclosure duties.

NOT RETROACTIVE

In *Gardiner v. Walmart*, No. 20-cv-04618 (N.D. Cal. July 28, 2021), Judge Jeffrey White ruled that the CCPA did not apply retroactively. Plaintiff alleged that he found his data for sale on the dark web in 2019 and that the data was still available on the dark web in 2021. The court found this argument unavailing, stating that the security breach must have "occurred on or after January 1, 2020," the effective date of the CCPA.

PLEADING REQUIREMENTS

Courts have come out differently when considering motions to dismiss based on lack of specificity and failure to meet pleading requirements. In *Burns v. Mammoth Media, Inc.* No. 20-cv-04855 (S.D. Cal. Aug 9, 2021), Judge Dean Pregerson in the Central District of California dismissed a proposed class action, finding that plaintiff had failed to adequately counter the app maker defendant's assertion that the incident had allegedly exposed only "essentially useless" information and that plaintiff had failed to allege a concrete injury necessary to establish Article III standing to move forward with his claims.

In contrast, several federal district courts have allowed claims to survive pleading challenges. In *Karter v. Epiq Systems, Inc.*, No. 20-cv-01385, (C.D. Cal. July 16, 2021), Judge Cormac Carney denied defendants' motion to dismiss, holding that the pleading threshold had been established and plaintiff plausibly alleged that defendants may be held liable as a business under the CCPA.

Finally, in *In re: Blackbaud Security Breach*, MDL No. 2972 (D.S.C. Aug. 12, 2021), a consolidated data breach case involving a well-publicized ransomware attack, the U.S. District Court for the District of South Carolina Judge J. Michelle Childs denied a motion to dismiss, stating Blackbaud could be both a "service provider" and a "business" under the CCPA and was not insulated from liability just because it may qualify as a "service provider." The distinction was left to be sorted out after the pleading stage.

ARTICLE III STANDING

The impact upon class action litigation of the U.S. Supreme Court's decision in *TransUnion LLC v. Ramirez*, including CCPA claims arising from data security incidents, has also been a trending topic in the early stages of CCPA litigation. For example, in *Maag v. U.S. Bank, et al.*, No. 21-cv-00031 (S.D. Cal. Oct. 25, 2021), Judge Marilyn Huff of the Southern District of California granted remand following plaintiff's argument that the federal court lacked subject matter jurisdiction over the action. She cited the *TransUnion* decision and plaintiff's contention that the court lacked Article III standing as to his CCPA claim and that there was no jurisdiction under the Class Action Fairness Act (CAFA). We are following this trend closely.

Class Settlements



CLASS SETTLEMENTS

To date, there have been approximately 17 class settlements, either finally approved or making their way to final approval. Despite the early stage and small sample size, there have been some significant insights to draw from the class settlements. First, all of the settlements involve a data breach/data security incident. This is not surprising, given the CCPA does not provide consumers a private right of action for violation of their privacy rights (e.g., right to notice, right to opt out, right to delete) and recent court rulings have confirmed that courts interpret the CCPA to be limited to data breaches.

Second, the monetary relief in the settlements to date encompasses a wide range—from \$250k to \$85 million, driven largely by class size. The majority of settlements include a non-reversionary settlement fund, while a handful attempt to utilize a claims-made settlement based on out-of-pocket losses with caps.

Class settlements range from \$0.46 to \$244 per class member, with a median of \$4.17 and an average of \$29.30 per class member. The median settlement value is \$2.6 million, and if the highest and lowest values are removed as outliers, the average settlement value is approximately \$3.1 million. In addition, the settlements follow the general trend that smaller class sizes usually have a larger settlement value per class member and larger class sizes have a lower settlement value per class member. Moreover, each of the settlements includes a prospective relief component (e.g., credit monitoring, required data security enhancements, etc.) in addition to monetary relief.

Another emerging trend is the inclusion of California settlement subclasses. Members of California subclasses are generally offered additional monetary compensation: often \$50 to \$100 more than the settlement benefits offered to the nationwide class. These additional payouts for California residents appear to be designed to account for the availability of statutory penalties under the CCPA.

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SUMMARY OF THE CCPA SETTLEMENTS TO DATE

In re Herff Jones Data Breach Litigation

Data breach class action arising out of an alleged cyberattack on the computer systems that process online shopping transactions.

Settlement value: \$4,350,000

Class size: 1,000,000
Nationwide California Subclass

Filed: 5.25.21 | **Settled:** 11.5.21

Harbour, et al. v. California Health & Wellness Plan

Data breach class action alleging hackers accessed Health Net's files containing plaintiffs' and class members' PII/PHI.

Settlement value: 10,000,000

Class size: 1,506,868 Nationwide

Filed: 5.4.21 | **Settled:** 10.29.21

Carrera Aguallo et al v. Kemper Corporation

Data breach class action where plaintiffs allege that an unauthorized user gained access to current and former employees' and agents' PII.

Settlement value: Out-of-Pocket Losses—up to \$10,000 per class member; California Class capped at \$4,000,000

Class size: 6,151,872 Nationwide
California Subclass

Filed: 4.8.21 | **Settled:** 7.30.21

Beyer v. Flagstar Bancorp, Inc.

Data breach class action arising from the Accellion cyberattack and alleging Flagstar customers' and employees' PII was compromised.

Settlement value: \$4,350,000

Class size: 1,477,411 Nationwide
California Subclass

Filed: 3.30.21 | **Settled:** 8.2.21

Cochran et al v. Accellion, Inc.

Data breach class action filed against cybersecurity firm Accellion on behalf of individuals claiming that their personal and medical information had been compromised.

Settlement value: \$5,000,000

Class size: 3,820,000 Nationwide

Filed: 3.17.21 | **Settled:** 6.30.21

SUMMARY OF THE CCPA SETTLEMENTS TO DATE (CONTINUED)

Newman v. JM Bullion

Data breach class action against precious metal trader alleging unauthorized access and exfiltration, theft, or disclosure of customer information.

Settlement value: Pending

Class size: 28,234 Nationwide

Filed: 2.26.21 | **Settled:** 12.3.21

Ken Hashemi et al v. Bosley, Inc.

Data breach class action alleging failure to implement and maintain reasonable security practices to protect consumers' sensitive personal information compromised during a ransomware attack.

Settlement value: \$500,000

Class size: 100,839 Nationwide
California Subclass

Filed: 2.1.21 | **Settled:** 12.1.21

Poling v. Artech LLC

Data breach class action alleging that defendant workforce solutions company failed to properly protect the personal information of defendant's users, resulting in a data breach.

Settlement value: Out-of-Pocket
Losses—up to \$10,000 per class member

Class size: 30,720 Nationwide
California Subclass

Filed: 10.9.20 | **Settled:** 7.8.21

Warshawsky et al v. cbdMD, Inc et al

Data breach class action alleging personal and financial information was exposed to unauthorized third parties in violation of privacy laws.

Settlement value: \$300,000

Class size: 44,541 Nationwide

Filed: 10.9.20 | **Settled:** 3.4.21

Stoffers v. Dave, Inc.

Data breach class action arising from a hack that allegedly accessed personal information and then posted the entire database on a hacker forum.

Settlement value: \$3,200,000

Class size: 7,000,000 Nationwide

Filed: 9.16.20 | **Settled:** 9.1.21

SUMMARY OF THE CCPA SETTLEMENTS TO DATE (CONTINUED)

Pygin et al v. Bombas, LLC

Data breach class action following alleged breach of e-commerce platform exposing customer data, including names, addresses, and credit card information.

Settlement value: \$225,000

Class size: 83,000 Nationwide

Filed: 7.1.20 | **Settled:** 2.19.21

Atkinson et al v. Minted, Inc.

Data breach class action alleging the service failed to implement reasonable security measures to protect customers' PI or prevent and detect unauthorized access to the data in violation of the CCPA.

Settlement value: \$5,000,000

Class size: 4,198,490 Nationwide

Filed: 6.11.20 | **Settled:** 4.16.21

Anurag Gupta et al Aeries Software, Inc.

Data breach class action alleging breach that exposed PII of individuals through the school district, relating to the Aeries School Information System to manage student data.

Settlement value: \$1,750,000

Class size: 98,199 Nationwide

Filed: 5.28.20 | **Settled:** 4.2.21

Llamas v. Truefire, LLC et al

Data breach class action stemming from allegations of hackers scraping many of defendant's customers' names from the website by infecting it with malware and stealing customers' PII.

Settlement value: \$1,200,000

Class size: 4,911 Nationwide

Filed: 4.14.20 | **Settled:** 10.4.21

LOOKING AHEAD

As we look forward, we must remember that the CCPA has been in effect for only two years. Plaintiffs will continue to test boundaries and attempt to circumvent the CCPA's limited private right of action. And as cases progress further in litigation, courts will continue to issue notable rulings that will undoubtedly shape the landscape of CCPA litigation, which is still in its early stages.

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